T

v.

O

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 24-214-91]
3 JULY 1992

CIVIL PROCEDURE: *Originating summons application - Every material allegation contested - Full hearing necessary to make findings of fact - Necessity for order under O. 28 r. 8 Rules of the High Court 1980.*

FAMILY LAW: *Child born out of marriage not solemnized according to Law Reform (Marriage & Divorce) Act 1976 - Marriage celebrated after Act came into force - Rights of natural parents over infant - Application by natural mother for custody and appointment as guardian of infant - Preliminary objection by father - Whether Court has jurisdiction to entertain application made under s. 10 Guardianship of Infants Act 1961 in this situation - Allegation raised infant is illegitimate as a consequence of the marriage not having been solemnized - Status of infant - Court's supervisory jurisdiction to inquire into status of infant.*

WORDS AND PHRASES: *"Custody" and "guardianship" - Differences in meaning in legal terminology - Meaning of "father" under ss. 5, 6 Guardianship of Infants Act 1961.*

The plaintiff (T) and the defendant (O) had on 27 May 1988 celebrated a Chinese customary marriage. On 7 December 1988 a child (O.R.D.) was born to them. O and T, O's mother and brother and the infant all lived in the same house until 1 October 1990 when T left as a result of differences. In April 1991 she filed an originating summons, asking, *inter alia* for (i) custody of O.R.D. (ii) guardianship of O.R.D. under s. 10 of the Guardianship of Infants Act (iii) maintenance of RM350 per month for O.R.D.

O contested allegations material to the case. At the hearing, a preliminary objection was raised as to the fact that the Court had no jurisdiction to determine the application made under s. 10 of the aforesaid Act because the infant was allegedly illegitimate.

Held:

[1] Sections 9 & 10 of the Guardianship of Infants Act 1961 does not preclude a natural father from applying to be appointed guardian but since the welfare of the child is of paramount importance, a strong case will have to be made out. Custody applications can be made by either parent in appropriate circumstances.

[2] Whether the customary Chinese marriage between T and O was invalid under the law Reform (Marriage & Divorce) Act is a finding of fact which must be deferred until the facts and law are fully argued. Thereupon, it becomes crucial to determine if the infant O.R.D. is legitimate or illegitimate as its welfare is of first consideration in a custody matter. The supervisory jurisdiction of the Courts over the person and property of all infants calls for an in depth enquiry.

[3] It will not be possible to make findings of fact on contested allegations without a full hearing. In the interests of justice. O. 28 r. 8 RHC 1980 is to apply to allow the proceedings commenced by originating summons to continue as though begun by writ. T to file and serve a statement of claim within 30 days; defence and counterclaim (if any) to follow thereafter.

O.R.D. to be represented by *amicus curiae*.

[4] Meanwhile, T to give custodial access to O every Saturday morning till Sunday evening until further order. Costs to be reserved with liberty to apply.

[Orders accordingly.]

Cases referred to:
SP Ponniah Pillay v. Senthamarai d/o Villasamy [1954] 20 MLJ 176 ***(cit)***
Hewer v. Bryant [1969] 3 All ER 578 ***(foll)***
Neale v. Colquhon [1944] SASR 110 ***(foll)***
Wedd v. Wedd [1948] SASR 104 ***(foll)***
Re Balasingam & Parvathy Infants Kannamah v. Palani [1970] 2 MLJ 74 ***(foll)***
In Re CT [1957] 1 Ch 48 ***(cit)***
Re Yeow Kien Kee [1949] MLJ ***(cit)***
In re Lee Siew Kow [1952] MLJ 184 ***(cit)***
Tan Siw Kee v. Chua Ah Boey [1988] 3 MLJ 20 ***(dist)***

Legislation referred to:
Administration of Justice Act 1928 [UK], s. 16
Adoption Act 1952, s. 4(1)(c)
Civil Law Act 1956, s. 27
Civil Law Enactment 1937, s. 6(1)
Courts of Judicature Act 1964, s. 24(d)
Guardianship of Infants Act 1886, s. 5
Guardianship Of Infants Act 1961, ss. 5, 6, 9, 10
Law Reform (Marriage and Divorce) Act 1976, ss. 2, 4(5), 5(3), (4), 9(3), 13, 22(3), (4), 24, 31, 33, 40, 67, 69, 75(1), (2), (3), (7), 87, 91, 99
Married Women and Children (Maintenance) Act 1950, s. 3(2)
Rules of the High Court, O. 28 r. 8

For the plaintiff - Lakshmi Ganesh; M/s. Siva Segara & Co.
For the defendant - K.H. Lee; M/s. Lee Kok Heng & Co.

JUDGMENT

Mahadev Shankar J:

This judgment concerns the respective rights of parents of children born out of marriages which have not been solemnized in accordance with the statutory formalities presented by the Law Reform (Marriage and Divorce) Act 1976 (the Act).

On 7 December 1988 the plaintiff T gave birth to a son. She is named as the mother and O as the father in the birth certificate. The son is named O.R.D. (that is carries the father's surname). O claims that he wanted a marriage under the Act, but T refused. She would only agree to a Chinese customary marriage which was celebrated on 27 May 1988. There is no suggestion that either party was married to any one else on that date. After O.R.D. was born the parties lived together in O's house in Shah Alam. Both T and O were working. So O.R.D. was taken care of by O's mother C, who lived with them as did O's teenage brother.

Differences arose between them. On 1 October 1990 T left the house taking with her a substantial part of the domestic furniture and appliances and O.R.D. She went to stay with her mother in Segambut.

She filed this application in April 1991. She is claiming for an order that she be given custody of and be appointed guardian of O.R.D. under s. 10 of the Guardianship of Infants Act 1961, on the ground that O is not a fit person to have custody or guardianship, for maintenance

of RM350 per month for O.R.D., for a half-share of the matrimonial home to be held by her as trustee for O.R.D., and for the return of a sum of RM2500 said to be a loan and for costs. *a*

The application is based on evidence contained in an affidavit by T. Every allegation material to this application is being contested by O. Consequently on any view of the matter it will not be possible to make findings of fact on these contested allegations without a full hearing.

However a preliminary objection was raised as to the jurisdiction of this Court to entertain this application at all because O.R.D. was allegedly illegitimate. As a result this matter has acquired deep rooted social implications which makes an enquiry in depth into the legal position desirable. *b*

Section 27 of the Civil Law Act 1956 - Laws of Malaysia Act 67 (Revised - 1972) provides:

> In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law. *c*

This section is the same as s. 6(1) of the Civil Law Enactment 1937 which was considered in depth in *SP Ponniah Pillay v. Senthamarai d/o Villasamy* [1954] 20 MLJ 175. The factual similarities makes the decision one of substantial interest. At p. 176 Buhagiar J said: *d*

> It may here be pointed out that the obligation of the putative father to maintain the child arises under s. 488 of the Indian Criminal Procedure Code, whose provisions are similar to those in s. 3 of the Local Married Women and Children (Maintenance) Ordinance, 1950 (No. 36 of 1950). I mention this because there are statements in English law books which are taken to be authority for the proposition that in English law the right of a mother to the custody of her illegitimate child arises out of her obligation to maintain her child - formerly under the Poor Laws and now under the National Assistance Act 1948. This is correct only in so far as the rights of the mother at common law are concerned. But as Lord Herschell in *Barnardo v. McHugh* [1891] AC 388, stated (at p. 398): *e*
>
> It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the Courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. *f*
>
> The fact, therefore, that under the local law the putative father may be liable to maintain an illegitimate child does not necessarily give him the right of custody.
>
> In English law the father of an illegitimate child, so long as the child remains illegitimate, is not generally recognised for civil purposes; he is under no obligation to provide for the child, in the absence of an affiliation order, unless he had adopted it *de facto* or obtained an adoption order; unless he has obtained an adoption order he has no right to the custody of the child, even though he is in a better position to maintain it; the Court will protect his right whenever he is in lawful custody of the child. (*Halsbury's Laws of England*, 3rd Ed. Vl. 3 at pp. 108, 109). The mother of an illegitimate child has *prima facie* the right of custody and when questions on custody arise the wishes of the mother are to be taken into account but the welfare of the infant is the first and paramount consideration. ... *g*

The parties here were Hindus and Indian nationals. At the time of the birth of the infant in 1949 the respondent mother believed she was lawfully married to the applicant father. They lived together till 1953. In 1951 the applicant father went to India and contracted a second marriage. He brought this wife to Malaya and had a daughter by her. In 1953 the respondent mother left the applicant when she realised she was only the applicant's mistress. Her son however had been staying with her sister's family for three to four years prior to the filing of the application. Counsel for the parties admitted to the Court that their "marriage" was *h* *i*

not valid. The applicant putative father was applying for custody of his son who had never lived with him except for a short period of four months when he went to India.

The Court exercised jurisdiction and dismissed the application because the welfare of the son required that the respondent mother should have custody.

At this point, I would pause to emphasise that "custody" is not the same thing in law as "guardianship".

As Lord Denning MR said in *Hewer v . Bryant* [1969] 3 AER 578 at p. 582:

> I am quite clear that in these Acts the words "in the custody of a parent" are used to denote a state of fact and not a state of law.

See also *Neale v. Colquhon* [1944] SASR 110 -"Custody" is not necessarily co-extensive with "guardianship". And *Wedd v. Wedd* [1948] SASR 104 at 1106 per Mays J - "Custody essentially concerns control and the preservation and care of the child's person ... .

In a loose sense and in the absence of a Court order, a child's guardian may be regarded as that person who is vested with the parental rights and duties over a child. In legal proceedings should a guardian be defined with greater precision? By the Adoption Act 1952 (Revised 1981 Act 157) a "guardian" in relation to a child means any person ... other than its natural parents, who has custody of a child. "Spouse" in the case of a Chinese man is his principal wife, and s. 4(1)(c) permits the making of an adoption order if the applicant is the mother or the father of the child. It is obvious this reference is to the natural mother or father and the child is illegitimate. A natural father or mother can become a lawful father or mother of "an illegitimate child" by adoption even if either parent at the time of birth was married to somebody else.

Notwithstanding s. 27 of the Civil Law Act 1956 it was submitted on the strength of *Re Balasingam & Parvathy Infants Kannamah v. Palani* [1970] 2 MLJ 74 that this Court had no jurisdiction. The applicant mother there applied for the custody of her two illegitimate children. It is not clear from the judgment who had the *de facto* custody of the infants at the time the application was made. The issue however was whether the Court has jurisdiction to entertain an application by a *de facto* mother for a custody order **under the Guardianship of Infant Act 1961** (Emphasis added). In a careful and compelling judgment DYMM Raja Azlan Shah (as he now is) held that the Guardianship of Infants Act 1961 does not apply to illegitimate children.

In his commentary to this decision Prof. Visu Sinnadurai (now Sinnadurai J) says this conclusion cannot be supported. He goes on to say that the Court's view that the jurisdiction in custody cases as provided by s. 24(d) of the Courts of Judicature Act 1964 is restricted to applications under the Guardianship of Infants Act 1961 is incorrect.

With respect, I think that this criticism must be re-evaluated. The decision was undoubtedly influenced by the powerful judgment of Roxburgh J, *In re C.T.* [1957] 1 Ch.48 where it was held that the words "mother" and "father" in the English legislation under consideration meant "lawful" father and mother (as opposed to "natural" father and mother). Consequently it followed that under the English legislation Magistrates had no jurisdiction to entertain an application by a putative father (that is the natural father of an illegitimate child) for a custody order under s. 5 of the Guardianship of Infants Act 1886 (where the application could be made by the lawful 'mother') as amended by s. 16 of the Administration of Justice Act 1928 (which extended the jurisdiction to the "father").

Under English common law a father of an illegitimate child had no "rights" over the child merely by virtue of his paternity. He had a legal obligation to support it provided it could be legally established that he was the father. That had to be done by extrinsic evidence. Maternity is a fact. Paternity only an opinion. The very serious social consequences which would follow by equating a natural father or mother to a lawful father or mother in the English legislation under consideration has been spelt out at great length and with great clarity by Roxburgh J and need not be repeated here.

Under our Married Women and Children (Maintenance) Act 1950 (Act 263) s. 3(2) due proof is required both that the person sued is the father, and that his illegitimate child is unable to maintain itself before the Court will order maintenance. But once again be it noted that the sum is not to exceed RM50 per month. Legitimate children can get a reasonable monthly allowance as can their mothers. Mother's of illegitimate children are not provided for. (The exemption of illegitimate children and their parents who profess Islam from the Act should be noted - see s. 13 of the Act and each of the State Enactments from Selangor in 1952 to Johor in 1978). The Guardianship of Infants Act 1961 on the other hand was not to apply to Muslims unless it was adopted by State Law, and this does not appear to have happened).

So I need not comment here on the position of an illegitimate child whose mother professes the religion of Islam.

So far as O.R.D. is concerned it is crucial to determine his status. Is he legitimate or illegitimate? The supervisory jurisdiction which the law vests in this Court over the person and property of all infants in the realm makes it imperative that this issue is properly investigated.

Straightaway let it be said that there is a qualitative difference between the common law of England and the customary law of Malaysian Chinese on legitimacy. A marriage under Chinese customary law was to be proved by long continued co-habitation with intention to form a permanent union and repute of marriage. The only essential legal requirement of a Chinese customary marriage is that the marriage must be consensual. The ingredients of a ceremony are evidential only and not essential: See *Re Yeow Kien Kee* [1949] MLJ (7) and *In re Lee Siew Kow* [1952] MLJ 184 and the Report of the Royal Commission on Non-Muslim Marriage & Divorce Laws - 15 November 1971.

Had T & O 'married' each other prior to the coming into force of the Act, their marriage would have continued to be treated as valid by s. 4. The issue now is whether O.R.D. is deemed to be illegitimate because this marriage was ''celebrated' after the Act came into force?

Now s. 5(3) of the Act provides as follows:

> Every person who on the appointed date is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia.

This section appears to leave it open to an unmarried person to contract a customary marriage within or outside Malaysia. The evidence in this case does not show where the marriage between T and O was celebrated.

Section 5(4) of the Act reads as follows:

> After the appointed date, no marriage under any law, religion, custom or usage may be solemnised except as provided in Part III.

This obviously applies to marriages solemnised in Malaysia. It commences with s. 9 which provides that a marriage under this Act can only be solemnised by a Registrar. The term includes an Assistant Registrar (s. 2). The solemnisation of a marriage through religious ceremony, custom or usage is permitted by s. 24 of the Act but only by a clergyman, minister, or priest appointed by the Minister to act as Assistant Registrar and that too only after the delivery to him of the statutory declaration under s. 22(3). By s. 40 of the Act any person who not being authorised thereto under the Act solemnises **any** marriage shall be guilty of an offence under the Act. There does not appear to be any section specifically making the conduct of the parties going through the ritual of an unauthorised customary marriage a criminal offence. Registration under s. 33 of customary marriages only applies to those which took place before the appointed date. (s. 4(2) of the Act deems such marriages registered anyway.)

Whether this customary Chinese marriage between T and O was invalid under the Act is a finding which must be deferred until the facts and the law are fully argued. There are other problems.

Now s. 75(2) of the Act provides:

> Subject to the provisions of this section, the child of a void marriage shall be treated as the legitimate child of his parents, if, at the time of the solemnisation of the marriage both or either of the parties reasonably believed that the marriage was valid.

This section has to be read with s. 67 and s. 69 of the Act which read as follows:

> **Section 67 Extent of power to grant relief**
>
> Nothing in this Act shall authorise the Court to make any decree of nullity of marriage except -
>
> (a) where the marriage has been registered or deemed to be registered under this Act; or
>
> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
>
> (c) where both the parties to the marriage reside in Malaysia at the time of the commencement of the proceedings.
>
> **Section 69. Grounds on which a marriage is void.**
>
> A marriage which takes place after the appointed date shall be void if -
>
> (a) at the time of the marriage either party was already lawfully married and the former husband or wife of such party was living at the time of the marriage and such former marriage was then in force;
>
> (b) a male person marries under eighteen years of age or a female person who is about sixteen years but under eighteen years marries without a special licence granted by the Chief Minister under s. 10;
>
> (c) the parties are within the prohibited degree of relationship unless the Chief Minister grants a special licence under subsection (6) of s. 11; or
>
> (d) the parties are not respectively male and female.

It is problematical whether a "customary" Chinese marriage not solemnized in accordance with Part III of the Act will attract the nullity provisions under s. 67. Is the word "void marriage" under s. 75(2) intended to refer to a marriage held to be void only on the grounds specified in s. 69? "Marriages" after all can take place anywhere and cases where one or both of the parties have been hoodwinked into believing they have been lawfully married by

an impostor without any lawful authority are not unknown. The provision of s. 22(4) which avoids any marriage purported to be solemnised in Malaysia unless a certificate or licence is issued should be noted as also s. 31 which deals with the registration of foreign marriages.

In all cases involving custody or guardianship the paramount consideration is the welfare of the child. Section 87 of the Act reads:

Meaning of "child"

In this Part, wherever the context so requires, "child" has the meaning of "child of the marriage" as defined in s. 2 who is under the age of eighteen years.

And by s. 2 "child of the marriage" reads:

"child of the marriage" means a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family by the other party; and "child" in this context includes an illegitimate child of, and a child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption.

This definition under s. 2 includes an illegitimate child of either of the parties to the marriage, accepted as one of the family by the other party and an adopted child who as has already been seen could also be an illegitimate child of the adoptive parent. There is a duty on the man to maintain the child. (See s. 99). By s. 91 the mother has presumptive custody only if the child is deemed legitimate under s. 75, in the absence of any agreement or order to the contrary.

Section 75(1), (2), (3) and the first limb of (7) on the meaning of a "void marriage" reads as follows:

Legitimacy where nullity decree made.

(1) Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled shall be deemed to be their legitimate child.

(2) Subject to the provisions of this section, the child of a void marriage shall be treated as the legitimate child of his parent if, at the time of the solemnisation of the marriage, both or either of the parties reasonably believed that the marriage was valid.

(3) Subsection (2) applied:

(a) only where the father of the child was domiciled in Malaysia at the time of the marriage; and

(b) in so far as it affects the devolution of any property only to children born after the appointed date.

(7) In this section the following expressions have the meaning hereby assigned to them, that is to say -

"void marriage'' means a marriage declared to be void under ss. 6, 10, 11, subsection (4) of s. 22 or s. 72;

It must be self-evident by now that *In re C.T.* [1957] 1 Ch 48 is a decision which cannot be applied, across the board, to the Malaysian situation. The question of legitimacy can be a complex one. Of course in a case where illegitimacy is clear, and there never was any question of a marriage either *de facto* or *de jure* I would respectfully agree with the Court in *Re Balasingam and Parvathy* but only to the extent that the natural mother of an illegitimate

child is the person in whom the parental rights and duties will vest exclusively, in the absence of a Court order. Such a mother has no right to claim any provision for herself. Her claims for maintenance for her illegitimate child is restricted to RM50 per month. The natural father in such a case has no rights whatsoever over the infant in the absence of a Court order. Consequently the word father in ss. 5 and 6 of our Guardianship of Infants Act 1961 also must mean the lawful father but as that expression should be understood in the context of "a child of the marriage" under the Law Reform (Marriage & Divorce) Act 1976. It is also my view that ss. 9 and 10 of the Guardianship of Infants Act does not preclude a natural father, from applying to be appointed guardian, but bearing in mind that it is the welfare of the infant which is paramount, a strong case will have to be made out. Custody applications can be made by either parent in appropriate circumstances and it is not irrelevant to point out that by the Second Schedule Part II Article 1(a) of the Second Schedule to the Federal Constitution every person born in Malaysia after Malaysia Day, of whose parents one at least is at the time of birth either a citizen or permanent resident in the Federation, is a citizen by operation of law.

The Singapore decision of *Tan Siw Kee v. Chua Ah Boey* [1988] 3 MLJ 20 has not escaped my attention. Whilst the child there was truly illegitimate the issue of jurisdiction was not raised. The order made was for custody only in favour of the putative father because in the circumstances of that case the Court felt it best for the infant.

Enough I think has been said to demonstrate that the outcome of the issues raised in this case are of far greater importance to O.R.D. than his combatant mother who makes no concession even for access to O who gave O.R.D. his name and sheltered him till his removal, or to O himself who remained passive till this application was filed.

In the interests of justice I make an order as provided by O. 28 r. 8 of the Rules of the High Court that these proceedings do continue as if the matter had begun by writ but that the plaintiff do file and serve a formal statement of claim within 30 days and that a defence and counterclaim, if any, be filed and served within 30 days thereafter and a reply and defence to counterclaim if any 14 days thereafter. The trial will take place on 19, 20, 21 April 1992. O.R.D. shall be represented by *amicus curiae* who will be appointed by the Court.

In the meantime I order the plaintiff to produce O.R.D. to his father if O should so desire every Saturday morning for ~~custodial access till Sunday evening~~ at 6 p.m. at his house in Shah Alam until further order.

The costs shall be reserved and there will be liberty to apply.

Also found at [1992] 3 CLJ 1756